

RESOLUTION NO. 2009-108

A RESOLUTION ~~OF~~ THE LODI CITY COUNCIL
AUTHORIZING THE CITY MANAGER TO EXECUTE AN
EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT
WITH EDEN DEVELOPMENT, INC. REGARDING A
SENIOR HOUSING PROJECT AT 2245 TIENDA DRIVE

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NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council does hereby authorize the City Manager to execute an Exclusive Right to Negotiate Agreement with Eden Development, Inc., a California corporation, for the development of an affordable senior housing project known as the "Tienda Drive Senior Housing Project," attached hereto marked Exhibit A.

Dated: August 5, 2009

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I hereby certify that Resolution No. 2009-108 was passed and adopted by the City Council of the City of Lodi in a regular meeting held August 5, 2009, by the following vote:

AYES: COUNCIL MEMBERS – Hitchcock, Johnson, Katzakian, Mounce,
and Mayor Hansen

NOES: COUNCIL MEMBERS – None

ABSENT: COUNCIL MEMBERS – None

ABSTAIN: COUNCIL MEMBERS – None


RANDI JOHL
City Clerk

EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

This Exclusive Right to Negotiate Agreement (“**Agreement**”) is entered into effective as of _____, 2009 (“**Effective Date**”), by and between the City of Lodi, a municipal corporation (“**City**”) and Eden Development, Inc., a California nonprofit public benefit corporation (“**Eden**”). City and Eden are referred to collectively as the “**Parties**.”

RECITALS

A. The City owns that unimproved parcel consisting of approximately 3.39 acres located at 2245 Tienda Drive in the City of Lodi, more particularly described in Exhibit A attached hereto (the “**Property**”).

B. The City has determined that the desired future use of the Property shall be an affordable rental residential development that is age restricted for seniors. Accordingly, the City issued a Request for Qualifications (“**RFQ**”) inviting submissions from developers interested in developing the Property with affordable rental housing for seniors with restrictions compatible with the financing requirements of the Community Development Block Grant Program (“**CDBG**”), the Home Investment Partnership Act (“**HOME**”) and the Department of Housing and Urban Development (“**HUD**”) Section 202 Supportive Housing for the Elderly Program (“**HUD 202**”).

C. In response to the City’s RFQ, Eden submitted its qualifications to construct, own and operate rental housing affordable to very low and low income senior households at the Property (the “**Senior Project**”). On April 1, 2009, the City Council selected Eden as the developer for the Property and directed staff to proceed with the preparation of this Agreement for the exclusive right to negotiate an agreement whose terms and conditions would govern the conveyance of the Property to Eden for the development of the Senior Project, by Eden.

D. In reliance on the City Council’s selection of Eden as the developer of the Property, Eden will commence its due diligence and predevelopment activities for the acquisition of the Property and development of the Senior Project, including submitting applications for project financing, which include but are not limited to CDBG, HOME and HUD 202 funds.

E. Until such time that the appropriate environmental assessment of the Senior Project is complete in accordance with the provisions of the California Environmental Quality Act (“**CEQA**”) and the National Environmental Policy Act (“**NEPA**”), an Option to Purchase and Purchase Agreement (“**Purchase Agreement**”) or a Disposition Development and Loan Agreement (“**DDLA**”) cannot be entered into by the Parties. This Agreement is expressly conditioned on a subsequent determination to proceed with, modify or cancel the Senior Project based on the required environmental review, pursuant to CEQA and NEPA requirements.

F. The purpose of this Agreement is to set forth the Parties’ common understanding that Eden shall have the exclusive right to negotiate a Purchase Agreement or a DDLA to develop the Property, and that for the term set forth in this Agreement, the City shall not discuss or negotiate development opportunities or rights with respect to the Property with any other person or

entity other than Eden, and that the Parties shall enter into a Purchase Agreement or DDLA, to be negotiated, upon environmental approval of the Senior Project.

G. As more fully set forth in this Agreement, the Parties acknowledge and agree that this Agreement does not grant Eden the right to acquire the Property or construct the Senior Project, nor does it obligate Eden to any activities or costs to acquire the Property or construct the Senior Project

H. In addition to the purpose set forth in Recital F, this Agreement provides evidence of the Parties intention regarding Eden's site control of the Property for the future acquisition and development of the Property, to induce potential project lenders to accept Eden's applications for project financing for the Senior Project.

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

1. Disposition, Development and Loan Agreement. The Parties shall use their best efforts to successfully negotiate a Purchase Agreement or DDLA which shall describe the terms and conditions governing disposition of the Property for the development of the Senior Project. The Parties agree that a Purchase Agreement or DDLA shall include, without limitation, the following terms; provided however, nothing herein is intended to or shall limit the City's discretionary authority to approve, deny or condition specific land use entitlements for the Senior Project based on the required environmental review.

- 1.1. Senior Project.

- 1.1.1. Development Concept. The concept for the Senior Project includes the development of up to Ninety (90) rental housing units serving low-income seniors. The concept of "aging in place" (i.e., making sure that seniors can live independently even as they become frail), will be integral to the Senior Project. Accessibility will also be a priority. The Senior Project will have an elevator, include community spaces, laundry facilities and management offices, and all units will be fully adaptable and/or accessible.

- 1.1.2. Affordability Requirements. Upon conveyance of the Property to Eden, the Property will be subject to a recorded regulatory agreement between Eden and the City that will require Forty Nine Percent (49%) of the rental units be offered for rent and occupancy by very low and low income senior households at an affordable rent for a term of not less than Fifty Five (55) years.

- 1.2. Financial Terms.

- 1.2.1. Purchase Price. The purchase price for the Property shall be Six Hundred Thirty Dollars (\$630,000), as is substantiated by a qualified appraisal dated July 2, 2009.

- 1.2.2. Financing.

- 1.2.2.1. City CDBG and/or HOME Loan to Eden. Eden shall apply to the City for a CDBG and HOME loan of funds which have been set aside by the City in the amount of \$1,100,000.00, to finance the closing cost for Eden's acquisition of

the Property, with the balance of the loan proceeds used to finance predevelopment costs for the Senior Project. The City loan to Eden shall have, at a minimum, the following terms: be a nonrecourse loan secured by the Property; repaid on a residual receipts basis; shall bear interest at a simple rate not to exceed 3% per annum and shall be contingent (i.e., no accrual of interest if the interest is not paid current annually) if necessary to make the Senior Project financially feasible; and shall mature 55 years from the final certificate of occupancy issued for the Senior Project.

1.2.2.2. State HOME Funds. On or before August 14, 2009, Eden shall apply to the State of California ("State") for a State HOME grant of funds in the approximate amount of \$2, 800,000.00 to finance pre-development and development costs.

1.2.2.3. HUD Section 202 Funds. On or around September, 2009, Eden shall apply for HUD 202 funds in response to HUD's 2009 Notice of Funding Availability ("NOFA"). If the Senior Project is not selected for 2009 funding, Eden shall submit for HUD 202 financing in 2010 and 2011.

1.3 City Approvals. Eden shall be responsible for obtaining all approvals required by City for the Senior Project in accordance with City's standard application process for discretionary land use entitlements, including payment for all of City's costs of processing such approvals. Nothing set forth herein shall be construed as a grant of any such approvals, or as an obligation on the part of City to grant such approvals.

2. Purchase Agreement or DDLA Acknowledgments. The Parties agree that they shall use good faith efforts to seek City Council approval of a Purchase Agreement or DDLA by April 30, 2010. Eden expressly acknowledges that a Purchase Agreement or DDLA resulting from negotiations contemplated by this Agreement shall become effective only if a Purchase Agreement or DDLA is approved by the City Council following notice and hearing as required by applicable law and compliance with all other requirements of law, including without limitation CEQA and NEPA requirements. Without limiting the generality of the foregoing, this Agreement does not impose a binding obligation on the City to convey the Property to Eden, nor does it obligate the City to grant any approvals or authorizations required for the Senior Project. The Parties acknowledge that approval and execution of a Purchase Agreement or DDLA may precede formal approval and adoption of entitlements necessary for the development of the Senior Project, and the Parties agree that a Purchase Agreement or DDLA will provide that conveyance of the Property will be expressly contingent upon City Council approval, as applicable, of all discretionary entitlements required for the Senior Project.

3. Eden's Exclusive Right to Negotiate with City; Term. For a period of two (2) years commencing on the Effective Date (the "**Term**"), the City agrees that it will not, during the Term of this Agreement, directly or indirectly, through any officer, employee, agent, or otherwise, solicit, the submission of bids, offers or proposals by any person or entity with respect to the acquisition of any interest in the Property or the development of the Property, and the City shall not engage any broker, financial adviser or consultant to initiate or encourage proposals or offers from other parties with respect to the disposition or development of the Property or any portion thereof.

4. Eden's Studies: Right of Entry. During the Term, Eden shall use its best efforts to prepare, at Eden's expense, any studies, surveys, plans, specifications and reports ("**Eden's Studies**") Eden deems necessary or desirable in Eden's sole discretion, to determine the suitability of the Property for the Senior Project. Such studies may include, without limitation, title investigation, relocation plans, marketing, feasibility, soils, seismic and environmental studies, financial feasibility analyses and design studies. Eden shall be responsible for obtaining the City's advance written permission from the City Manager or his designee for access to the Property as may be necessary to prepare Eden's Studies. In connection with entry onto the Property, Eden shall and hereby agrees to indemnify, defend (with counsel approved by the City) and hold harmless the Indemnities (defined in Section 11) from and against all Claims (defined in Section 11) resulting from or arising in connection with entry upon the Property by Eden or Eden's agents, employees, consultants, contractors or subcontractors.
 - 4.1. Right of Entry Agreement; Copies of Reports/Tests. The City may require Eden to execute a right of entry agreement satisfactory to the City prior to entry onto the Property. The City Manager or his designee shall have authority to sign such agreement without further approval of the Council. Eden's inspection, examination, survey and review of the Property shall be at Eden's sole expense. Eden shall provide the City with copies of all reports and test results within ten (10) days following completion of such reports and testing, whether or not such reports and test results are completed prior to or after the expiration or earlier termination of this Agreement.
 - 4.2. Property Condition. Eden shall repair, restore and return the Property to its condition immediately preceding Eden's entry thereon at Eden's sole expense. Eden shall at all times keep the Property free and clear of all liens and encumbrances affecting title to the Property. Eden's indemnification obligations, obligations to provide reports and test results, and obligations to discharge liens that attach to the Property as set forth in Section 11 shall survive the expiration or earlier termination of this Agreement.
5. The City's Reports and Studies. Within fifteen (15) days following the Effective Date, the City shall make available to Eden for review or copying, at Eden's expense, all non-privileged studies, non-confidential surveys, plans, specifications, reports, and other documents concerning the physical condition of the Property that the City has in its possession or control.
6. Relationship of Parties. The Parties agree that nothing in this Agreement is intended to or shall be deemed or interpreted to create among them the relationship of buyer and seller, or of partners or joint venturers.
7. Confidentiality: Dissemination of Information. During the Term, each Party shall obtain the consent of the other Party prior to issuing or permitting any of its officers, employees or agents to issue any press release or other information to the press with respect to this Agreement; provided however, no Party shall be prohibited from supplying any information to its representatives, agents, attorneys, advisors, financing sources and others to the extent necessary to accomplish the activities contemplated hereby so long as such representatives, agents, attorneys, advisors, financing sources and others are made aware of the terms of this Section. Nothing contained in this Agreement shall prevent any Party at any time from

complying with the California Public Records Act, furnishing any required information to any governmental entity or authority pursuant to a legal requirement or from complying with its legal or contractual obligations.

8. Termination.

8.1. Mutual Consent. This Agreement may be terminated at any time by mutual written consent of the Parties.

8.2. City's Right to Terminate. The City shall have the right to terminate this Agreement upon its good faith and reasonable determination that Eden is not proceeding diligently and in good faith to carry out its obligations pursuant to this Agreement. The City shall exercise such right by providing at least thirty (30) days' advance written notice to Eden which notice shall describe the nature of Eden's default hereunder. Notwithstanding the foregoing, if Eden commences to cure such default within such thirty (30) day period and diligently prosecutes such cure to completion within the earliest feasible time, but not later than thirty (30) days following the date of the notice, this Agreement shall remain in effect.

8.3. Eden's Right to Terminate.

8.3.1. Financial or Physical Infeasibility. Eden shall have the right to terminate this Agreement, effective upon thirty (30) days' written notice to the City that Eden has determined the Senior Project is financially or physically infeasible and the City has reviewed and agreed, in its reasonable discretion, with Eden's determination.

8.3.2. Environmental and/or Entitlement Infeasibility. If the City Council is unable for any reason to adopt or approve the certification of environmental documents required for the Senior Project pursuant to NEPA, CEQA or to rezone the Property for the Senior Project, Eden shall have the right to terminate this Agreement and the City shall reimburse Eden for its actual out-of-pocket costs paid to third parties for predevelopment activities in connection with the proposed development of Property, provided the amount to be reimbursed shall not exceed Fifty Thousand Dollars (\$50,000.00).

9. Effect of Termination or Expiration of the Term. Upon termination as provided herein, or upon the expiration of the Term (and any extensions thereof) without the Parties having successfully negotiated a Purchase Agreement or DDLA, this Agreement shall be void, and there shall be no further liability or obligation on the part of any of the Parties or their respective officers, employees, agents or other representatives; provided however, the provisions of Section 4.2, Section 7, Section 8.3.2 and Section 11, shall survive such termination.

10. Notices. Each notice, demand or other document required to be given hereunder ("Notice") shall be in writing and shall be delivered personally (including messenger or courier service with evidence of receipt) or sent by the United States Postal Service ("USPS"), certified mail, return receipt requested, with proper postage prepaid, addressed to the parties at the respective addresses set forth below. Each Notice shall be effective upon being so deposited, but the time

period in which a response to any such Notice must be given or any action taken with respect thereto shall commence to run from the date of receipt of the Notice by the addressee thereof.

If to the City: City of Lodi Community Development Department
221 W. Pine Street
Lodi, CA 95240
Attention: Joseph Wood, Neighborhood Services Manager

If to Eden: Eden Development, Inc.
22645 Grand Street
Hayward, CA 94541-5031
Attention: Executive Director

copy to: D. Stephen Schwabauer, City Attorney
City of Lodi
221 W. Pine Street
Lodi, CA 95240

11. Indemnification. Eden hereby covenants to indemnify, hold harmless and defend the City and their respective elected and appointed officials, officers, agents, representatives and employees (all of the foregoing, collectively the "Indemnities") from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney's fees and costs of litigation) (all of the foregoing, collectively the "Claims") arising out of any act of negligence, misfeasance or willful misconduct of Eden in connection with this Agreement or the activities contemplated hereby. Eden shall have no indemnification obligation with respect to the negligence, misfeasance or willful misconduct of the City or for any Claims arising from the presence of any hazardous materials on the Property prior to conveyance of the Property to Eden. Eden's indemnification obligations set forth in this Section 11, shall survive the expiration or earlier termination of this Agreement. Notwithstanding the foregoing, in the event a CEQA or NEPA lawsuit is brought which relates to this Agreement, and a Purchase Agreement or DDLA to be negotiated, and/or the Senior Project, the Parties shall meet and confer about whether to proceed with the Senior Project. If the parties are unable to agree, either party may terminate this Agreement without further obligation.
12. Severability. If any term or provision of this Agreement or the application thereof shall, to any extent, be held to be invalid or unenforceable, such term or provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining terms and provisions of this Agreement or the application of such terms and provisions to circumstances other than those as to which it is held invalid or unenforceable unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provision.
13. Amendments: Counterparts. This Agreement may be amended only by a written instrument executed by the Parties or their successors in interest. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall

constitute one agreement.

14. Successors and Assigns; No Third-Party Beneficiaries. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that Eden shall not transfer or assign any of its rights hereunder by operation of law or otherwise without the prior written consent of the City, and any such transfer or assignment without such consent shall be void. Subject to the immediately preceding sentence, this Agreement is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns. The Parties acknowledge that Eden shall have the right to have a Purchase Agreement or DDLA entered into by, or assigned to, a limited partnership in which the general partner is a wholly-controlled affiliate of Eden.
15. Captions. The captions of the sections and articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.
16. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California without regard to principles of conflicts of law.


IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

CITY OF LODI
a California municipal corporation

By: _____
Blair King, City Manager

APPROVED AS TO FORM:

By: _____
D. Stephen Schwabauer, City Attorney



ATTEST:

By: _____
Randi Johl, City Clerk

EDEN DEVELOPMENT, INC.,
a California nonprofit public benefit corporation


By:  _____
Name: Terese McNamee
Its: Chief Financial Officer and Acting Executive Director

EXHIBIT A:

The Property